Before the Federal Trade Commission
Washington, D.C. 20580

Comments of Dawn Rivers Baker, President/CEO of Wahmpreneur Publishing, Inc.
in response to Notice of Proposed Rulemaking request for public comments

Definitions, Implementation and Reporting under the CAN-SPAM Act
Project No. R411008

Federal Register Notice (16 CFR Part 316)
dated May 12, 2005

Thank you for this opportunity to offer my comments regarding the proposed rules and opinions offered by the Federal Trade Commission (the "Commission") with respect to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), pursuant to the Federal Register Notice dated May 12, 2005.

My name is Dawn Rivers Baker and I am the President and CEO of Wahmpreneur Publishing, Inc., a woman-owned micro-corporation organized under the laws of the state of New York. I am also the editor and publisher of The MicroEnterprise Journal, a weekly microbusiness news publication delivered to paying subscribers by email, and of the Journal's Weekly News Briefs, a secondary news publication available free of charge. In that capacity, I was award the 2003 Small Business Journalist of the Year Award by the Syracuse (NY) District of the U.S. Small Business Association. My professional memberships include the Online News Association, the National Association of Female Executives, Women Impacting Public Policy and the International Council of Online Professionals, for which I serve as Founding Member in Government Relations and in which capacity I participated in last year's Email Authentication Summit.

As the operator of an online microbusiness and as a microbusiness journalist, I am in a position of being well versed in the common practices of these very small businesses. Therefore, it is both as a private citizen and as a member of the community of online microbusinesses that I offer these comments to the Commission. These comments are my own and do not represent the view of any of the organizations with which I am affiliated.

I would like to commend the Commission for its ongoing efforts to promulgate a rational regulatory regine that facilitates compliance with the CAN-SPAM Act in as

unburdensome a fashion as possible. For the most part, I believe the regulations proposed in the Notice of Proposed Rulemaking (NPRM) will effectively meet the enforcement requirements of CAN-SPAM without unduly burdening online microbusinesses. I will therefore confine my remarks to those matters that continue to cause me concern.

"Sender" Issues

The Commission's proposal to amend the definition of a "sender" under CAN-SPAM, which provides that in a multiple-advertiser scenario the advertisers can structure the message so that there is a single "sender" who would be responsible for CAN-SPAM compliance, is adequate. The fact that this is a voluntary provision with which multiple advertisers in a single message who choose not to comply will each be designated "senders," will likely be confusing to many microbusiness owners. However, as the conmon practice current among microbusiness marketers already produces the single designated sender scenario comtemplated by the proposed regulation, I doubt there will be much problem in practice. Further amendment to the sender definition should not be needed in order for most online microbusinesses to comply.

Online microbusiness publishers often augment their advertising revenues through affiliation with vendors whose products compliment the content of their pulications. In addition, many online microbusiness owners establish affiliate programs for their own products or services in order to acquire a sales force while expending minimal business resources. Therefore, the "safe harbor" provision would be one that would have a significant impact on online microbusinesses.

I believe that a "safe harbor" provision that exempts affiliates and other third parties from a requirement to scrub their e-mail lists against the merchant's list of opt-outs makes sense *only* for permission-based marketers. The legislation provides for lawful transmission of unsolicited commercial e-mail, but acquiring the affirmative consent of the recipient is considered to be "best practice" among ethical online marketers and most consumer groups. I do not believe this generally accepted "best practice" should be further undermined by a "safe harbor" provision that applies to unsolicited commercial email sent in bulk as well; CAN-SPAM compliant spam is still spam. Marketers who send spam should not be protected more than they already are under this legislation.

Transactional or Relationship Messages

In general, I concur with the Commission's assessment of the "transactional or relationship messages" definitions specified in the CAN-SPAM Act. Most of the issues arising with respect to the various sorts of electronic mail communications routinely sent by most online microbusinesses can be sorted out by the "primary purpose" rule previous promulgated by the Commission.

Many microbusinesses use third-party payment processing services, such as PayPal, 2CheckOut and LinkPoint, in order to consummate online transactions. Some of these third-party payment processors routinely send customer receipts with the name and/or email address of the merchant, rather than their own, in the "from" line. This scenario is analogous to the situation posited in the comments submited InterActive Corp. and cited in the NPRM regarding transactions processed by Expedia on behalf of an airline. I agree that such messages should be included as "transactional or relationship messages" under section 7702(17)(A)(i) of the CAN-SPAM Act.

In its comments submitted in March 2004, the International Council of Online Professionals argued that e-mail newsletters or other electronically delivered content for which recipients entered into a subscription arrangement constituted transactional or relationship messages under section 7702(17)(A)(v) of the Act. I agree with that position. When the recipient enters into a transaction to receive regularly delivered bona fide e-mail newsletters or other electronically delivered content from a firm, with or without the exchange of consideration, the existence of such transaction causes the messages subsequently delivered to fall into the transactional or relationship category, provided the message’s primary purpose remains generally true and the list administrator follows accepted “best practices,” so that list members either receive a confirmation notice, or have verified their request to subscribe, are able to unsubscribe at any time, and the unsubscribe is immediately honored.

Foreward-to-Friend Scenarios

Due to the low cost nature of viral marketing and its widespread use among online microbusinesses, the Commission's stance on "forward-to-a-friend" scenarios will be widely felt by online microbusiness owners.

The Commission has chosen to make a distinction between the web page or e-mail message that simply makes a link available (i.e., a hypertext link with text that simply says "forward this to a friend") and the web page or e-mail message that actively urges visitors or recipients to do so (i.e., the same mechanism but with text such as, "Help us spread the word!"). In the first instance, the merchant's actions would be deemed as "routine conveyance," while the second instance would be deemed to be "initiating" the mailing and would thus become subject to the provisions governing "commercial e-mail messages" under the CAN-SPAM Act.

While I am not inclined to quibble with this interpretation, I believe it poses some insurmountable obstacles in practice. A web site user or e-mail recipient who chooses to respond to the merchant's urging to forward a web page or e-mail message to a friend has no way of knowing whether that friend has already received the same message from someone else. Similarly, the web site owner or e-mail sender has no way of knowing in advance whether one of their visitors or recipients is about to send a message promoting their goods or services to someone who has already opted out of receiving further messages from them. The sort of readily available "forward-to-a-friend" software used by online microbusiness owners like myself does not offer an opportunity for the web site owner to intervene between the time the user presses the "send" button and the time the email is dispatched. Neither does a user's e-mail client permit the merchant to intercede when they are about to forward an email to one of their friends.

Under those circumstances, I cannot help wondering how the site owner or e-mail sender could possibly comply with an opt-out request with respect to such "forward-to-friend" scenarios? In general, microbusinesses use "forward-to-friend" software that does not collect information about either users or recipients (a deliberate software design choice to allay the privacy concerns of those users). Thus, in such scenarios, online microbusiness owners would not have the technical capability to intervene where the recipient is unknown to them until *after* the e-mail has already been sent. In practice, for the microbusiness owner to avoid becoming liable for CAN-SPAM compliance of which they are not technologically capable, they must largely abandon their viral marketing efforts in favor of less affordable marketing methods or intervene in the process in ways that may raise privacy concerns among their customers.

In light of the above, the Commission should specify that an opt-out request received in a "forward-to-friend" scenario is not applicable to future "forward-to-friend" messages. If the recipient of a "forward-to-friend" e-mail message responds to the opt-out mechanism, then the sender can be expected to add that address to its internal do-not-email list. However, the sender should not also be held liable if its other customers inadvertently send e-mail promoting its goods and services to recipients who have already asked not to receive further message from that sender. Given the current technological capabilities of most online microbusinesses, this clarification is needed in order to keep the Commission's reading of the "forward-to-friend" scenario from being an unreasonable burden.

General Comments

As a journalist who has spent a great deal of time reporting and analyzing the efforts of such entities as the U.S. Small Business Administration, Office of Advocacy and the House and Senate Committees on Small Business to address the burden of excessive regulation on small businesses, I have watched the Commission's activities with respect to CAN-SPAM with a great deal of interest. The Commission's reception of the input of the various stakeholders in this issue further confirms its excellent reputation as a federal regulator with respect to small businesses. However, the Commission can only work with what they are given by Congress.

As I have watched the Commission work to fulfill its obligations to promulgate regulations to enforce the CAN-SPAM Act and, additionally, have watched the interpretations and analyses of those regulations become increasingly complex, it has become evident to me that the body of rules we will all wind up with will do little to actually stop unsolicited commercial e-mail sent in bulk, while succeeding in contorting the way microbusinesses will be forced to do business online. Recall that most online microbusinesses do not have legal or administrative staff whose job it is to wade through a morass of federal regulations and figure out how to comply with them.

What were once simple acts of electronic communication among ethical online microbusinesses, their colleagues and their customers are becoming fraught with legal risk for businesses that are not the target of this legislation, to the possible detriment of the further expansion of e-commerce. I do not believe that is the intention of the

Commission nor is it the original intent of the legislative impulse to address the spam issue in the first place.

Simply put, CAN-SPAM is a very poor piece of legislation because it focuses on micromanaging the content of e-mail messages rather than addressing the underlying problem of unsolicited (as opposed to unwanted) bulk commercial e-mail.

According to a report published at Clickz.com on May 11, 2005, spam e-mail messages accounted for 84.6% of incoming e-mail in April 2005. How much of that volume can be considered as CAN-SPAM compliant spam is unknown, but the legislation has been ineffective in stemming the flood of unsolicited commercial e-mail messages. To that extent, it seems clear that the Act has made the smallest difference to the real problem.

The Senate Committee on Commerce, Science and Transportation report on the CAN-SPAM Act stated that the purpose of the legislation was to "(i) prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give recipients an opportunity to decline to receive future commercial e-mail from them and to honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also include a valid physical address in the e-mail message and a clear notice that the message is an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting, or permitting the promotion of, their trade or business through e-mail transmitted with false or misleading sender or routing information."

These purposes reduce simply to requiring e-mail marketers to make themselves transparent and easily identifiable to recipients and to disallowing fraudulent practices designed to hide their identities. Unfortunately, fraud is not the entire problem. The real problem is, and has always been, the insistence of some e-mail marketers on retaining the ability to send advertisements to consumers without their permission. This has made what was once a simple issue into a murky, complicated mess. While it is impossible to create an objective standard of "wanted" versus "unwanted" commercial email that would be applicable in every situation, the standard of "unsolicited" is very simple and straightforward.

There are a variety of representatives of business interests who have argued in favor of the "need" to maintain an opt-out standard that basically allows e-mail marketers to send spam as much as they wish, as long as they are compliant with any relevant regulations. The position that online marketers must be allowed to send unsolicited bulk commercial email because they would otherwise be unable to let customers know about new products and services is arrant nonsense. Proponents of this viewpoint are among the most widely-recognized brands in the online world, with sufficient resources that should enable them to advertise and promote new products and services without resorting to spamming consumers.

The Direct Marketing Association's assertion that people do make purchases due to the spam they get is not particularly convincing. The issue is not whether spam works. The issue is whether the burden should be placed on the consumer to opt-out of commercial messages rather than on the marketer to acquire that consumer's affirmative consent in the first place.

I know of no inherent right of e-mail marketers to inflict their messages on me when I have not asked to receive them. On the contrary, it seems to me that this rebellion against a simple act of civility is both irrational and unconscionable. The CAN-SPAM Act flies in the face of the best practices that have already been adopted by permission-based online microbusiness marketers and undermines those best practices by adopting a standard of legal, regulated spam.

It places a regulatory sword of Damoclese over their heads, as well. For every e-mail message they send, they will have to analyze the circumstances, figure out whether that message can be construed as a commercial message under CAN-SPAM, and then figure out what they need to do to comply. This is profoundly unfair to marketers and publishers who voluntarily acquire consumer affirmative consent prior to sending out a single marketing message.

CAN SPAM also places the United States in the unenviable position of being wholly out of step with much of the rest of the industrialized world, helping to make it the top international source of spam e-mail and the most spammer-friendly nation among those that have enacted legislation on this issue to date.

It seems to me that it would be a more efficient use of the Commission's time and effort to enforce a simple ban on unsolicited commercial e-mail sent in bulk than to endlessly impose an unwieldy mass of regulatory requirements on business owners who are not spammers. That is why I hope that, when the Commission issues its report to Congress on the effectiveness of CAN-SPAM later this year, they will recommend that Congress enact new legislation that unambiguously bans unsolicited commercial bulk e-mail.

Thank you again for this opportunity to offer input on the various proposed rules and opinions published by the Commission with respect to the CAN-SPAM Act.